

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| <b>KATHLEEN SPETH</b>                         | : | <b>CIVIL ACTION</b> |
| vs.   | : |                     |
| PENNSYLVANIA BOARD OF PROBATION<br>AND PAROLE | : | No. 98-1631         |
|   | : |                     |

**ORDER AND MEMORANDUM**

**ORDER**

AND NOW, to wit, this 15<sup>th</sup> day of May, 1998, upon consideration of the Petition for Writ of Habeas Corpus, filed *pro se* by Petitioner Kathleen Speth (Document No. 1, filed March 26, 1998), and brought pursuant to 28 U.S.C. § 2254, and review of the Report and Recommendation of United States Magistrate Judge Thomas J. Reuter (Document No. 4, filed April 7, 1998), for the reasons set forth in the accompanying Memorandum, **IT IS ORDERED** that:

The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is

**DENIED**; and

There is no probable cause to issue a certificate of appealability.

**MEMORANDUM**

**1. Background:** Petitioner is an inmate at the State Correctional Institution at Muncy and was denied parole by respondent on December 17, 1997. Respondent set forth the following reasons for denying parole:

Assaultive Instant Offense;  
Your need for counseling; and  
You deny responsibility for offense.

Petitioner asserts that her rights were violated by this denial of parole based on the following grounds:

She was denied her Fifth Amendment right not to be compelled to testify against herself;  
Respondents ordered her to participate in mental health counseling, but all her records indicate that she does not need such counseling;

She was ordered to “complete prescriptive programs” but she had completed all such programs as of June 10, 1995; and  
She was denied access to the state courts to challenge the improper denial of parole.

**2. Exhaustion:** Federal courts must dismiss a habeas petition “unless it appears that the . . . applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1). In this case, there is no evidence that petitioner has exhausted any of her claims. Nonetheless, a federal court may reach the merits of unexhausted claims in at least two circumstances. In the first circumstance, “[a]n application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(2). The second circumstance exists “where no available state corrective process exists or the particular circumstances of the case render the state process ineffective to protect the petitioner's rights,” Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C. §§ 2254(b)(1)(B)(i) and (ii)), thus making a return to state court “futile.” See also Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993) (discussing unexhausted claims which may be futile as result of state procedural bar); Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996) (same). A court may find that returning an unexhausted habeas claim to state court would be futile only if the claim is “clearly precluded from state court relief . . . .” Lambert, 134 F.3d at 517 (emphasis in original).

In the instance case, petitioner is challenging respondent’s decision to deny her parole. The Third Circuit has held that an inmate “has available three potential ways of attacking denial of parole in Pennsylvania – appeal, mandamus, or habeas corpus.” Burkett v. Love, 89 F.3d 135, 142 (3d Cir. 1996). Under this precedent, it cannot be said that petitioner is clearly foreclosed from state court relief. However, in reaching this conclusion, the Third Circuit noted that the state law in this area is “somewhat unsettled,” and went on to invite state law clarification: “Obviously, a ruling by the state Supreme Court or Commonwealth Court discussing . . . the proper channels for bringing such claims would be helpful in this frequently litigated area of law.” Id. (emphasis added).

Since Burkett was decided, the Commonwealth Court has provided state law clarification. In Weaver v. Pennsylvania Board of Probation and Parole, 688 A.2d 766 (Pa. Cmwlth. 1997), the court expressly addressed Burkett and held that inmates have no right of appeal from parole eligibility decisions. See Weaver, 688 A.2d at 775. Similarly, the court held that prisoners may not challenge a parole eligibility decision by recourse to a state writ of habeas corpus. See id. at 775 n.17. The court did hold that a parole eligibility decision may be challenged by petitioning for a writ of mandamus, but that such writ would only be granted where “the Board’s refusal to grant parole, *as evident solely in its decision*, was, as a matter of law, based upon an erroneous conclusion that it had the discretion to deny parole *for the reason given*.” Id. at 777 (emphasis added and footnote omitted). Thus, the Pennsylvania state courts will only consider granting a writ of mandamus if the Board makes clear in the body of its decision that the denial of parole is based on a ground which is outside the Board’s discretion to consider. Examples of grounds outside the Board’s discretion to consider would be an inmate’s race or sex.

In this case, the only grounds given for denying parole were “Assaultive Instant Offense,” “Your need for counseling,” and “You deny responsibility for offense.” None of the reasons given is outside of the Board’s discretion which – because “parole is a favor which lies solely within the Board’s discretion,” id. at 770; see also 61 Pa.C.S.A. § 331.21 – is extremely broad. As a result, the Court concludes that the petitioner is “clearly precluded from state court relief,” Lambert, 134 F.3d at 517 (emphasis in original), and it will, therefore, reach the merits of her claims.

**Discussion:** Petitioner’s first claim is that respondent forced her to testify against herself in violation of her rights under the Fifth Amendment. She alleges that because she had a Post Conviction Relief Act (“PCRA”), 42 Pa.C.S.A. § 9541 et. seq., petition pending, she was not free to testify about her offense and the Board’s conclusion that she “denies responsibility for her offense” therefore violated her privilege against self incrimination. It is true that someone convicted of an offense does not lose her right to assert the privilege against self-incrimination as to crimes of which she was not convicted. See, e.g., Minnesota v. Murphy, 465 U.S. 420, 426 (1984) (citing Baxter v. Palmigiano, 425 U.S. 308, 316 (1976)). In Pennsylvania, it is also true that:

“After conviction, the direct and collateral remedies available to an individual may result in a new trial. It is apparent, then, that a conviction does not eliminate the possibility that an individual will later be prosecuted for the crime about which he is asked to testify. Accordingly, the weight of authority permits a witness whose conviction has not been finalized on direct appeal to invoke the privilege against self-incrimination and refuse to testify about the subject matter which formed the basis of his conviction.”

Commonwealth v. Long, 625 A.2d 630, 635 (Pa. 1993) (quoting Commonwealth v. Rodgers, 372 A.2d 771, 780 (Pa. 1977)). Accordingly, assuming petitioner’s allegations to be true, she was free to exercise her privilege against self-incrimination when appearing before the Board. This conclusion does not, however, end the matter, for “[j]ust because one has a constitutional right does not mean that no adverse consequences can flow from exercising such a right.” Weaver, 688 A.2d at 778.

The Third Circuit has held that “[o]nce a defendant has been convicted of an offense, the [Fifth Amendment] privilege [against self incrimination] is lost because ‘he can no longer be incriminated by his testimony about said crime.’” United States v.

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<sup>1</sup> Even if the Court’s conclusion is erroneous and petitioner is not “clearly precluded from state court relief,” the Court may nonetheless reach the merits of her claims because it is denying her Petition. See 28 U.S.C. § 2254(b)(2).

Mitchell, 122 F.3d 185, 189 (3d Cir. 1997) (quoting Reina v. United States, 364 U.S. 507, 513 (1960)). The same is true where a defendant “has pled guilty to the offense.” Id. (citing United States v. Frierson, 945 F.2d, 650, 656 (3d Cir. 1991); United States v. Rodriguez, 706 F.2d 31, 36 (2d Cir.1983); United States v. Moore, 682 F.2d 853, 856 (9th Cir.1982)). This holding was made in the context of a sentencing decision, and the court wrote that:

We see nothing in the Fifth Amendment . . . or in the Supreme Court’s cases construing it that provides any basis for holding that the self-incrimination that is precluded extends to testimony that would have an impact on the appropriate sentence for the crime of conviction. The sentence is the penalty for the very crime of conviction, and if one could refuse to testify regarding the sentence then that would contravene the established principle that upon conviction ‘criminality ceases; and with criminality the privilege.’

Id. at 191 (quoting 8 Wigmore, Evidence § 2279 (McNaughton rev. 1961)).

It is clear under both federal and state interpretations of the right to assert the Fifth Amendment privilege, that whatever right petitioner may have not to testify, she has no right to prevent respondent from drawing adverse inferences from her refusal. As the Supreme Court has recently written, “[a]ssuming also that the Authority will draw adverse inferences from respondent’s refusal to answer questions – which it may do in a civil proceeding without offending the Fifth Amendment, [Baxter v.] Palmigiano, [425 U.S. 308, 316-18 (1976)] . . . we do not think that respondent’s testimony at a clemency interview would be ‘compelled’ within the meaning of the Fifth Amendment. It is difficult to see how a voluntary interview could ‘compel’ respondent to speak.” Ohio Adult Parole Authority v. Woodard, --- U.S. ---, ---, 118 S.Ct. 1244, 1252 (1998).

The Court therefore holds that petitioner may exercise her right not to testify before the Board, but that such refusal does not insulate her from any adverse consequences flowing from that decision. See Weaver, 688 A.2d at 778 (“That principle is true, even if it would result in the loss of that person’s probation.” (citing Minnesota v. Murphy, 465 U.S. 420 (1980))); see also Barnhouse v. Commonwealth, 492 A.2d 1182, 1183 (Pa. Cmwlth. 1985) (holding that right against self-incrimination has not been

violated where Board conditions parole on disclosure of waste dumping sites).

Accordingly, petitioner's right against self-incrimination has not been violated in this case.

With respect to petitioner's second and third claims – that the Board ordered her to participate in mental health counseling when she did not need it and that the Board required that she complete a “prescriptive program” although she had already completed one – as the Court has stated, Pennsylvania has granted its Board of Probation and Parole broad discretion in deciding whether to grant or deny parole. See Weaver, 688 A.2d at 770; 61 Pa.C.S.A. § 331.21. Because a decision as to parole eligibility rests solely in the discretion of the Board, inmates in Pennsylvania have no state created liberty interest in a grant of parole. See Weaver, 688 A.2d at 770. However, substantive due process still protects inmates from arbitrary denials of parole based on impermissible criteria such as race, political beliefs or such frivolous factors as the color of one's eyes. See Block v. Potter, 631 F.2d 233, 236, 236 n.2 (3d Cir. 1980). Thus, in deciding whether to grant a petition for writ of habeas corpus where denial of parole is at issue, a federal court is limited to determining whether the Board's “decision is . . . arbitrary and capricious . . . [or] based on impermissible considerations. In other words, the function of judicial review is to determine whether the Board abused its discretion.” Id. at 236.

In Pennsylvania, the Board, in exercising its discretion, is expressly directed to investigate the “mental and behavior condition and history” of a parole applicant and to consider the “character of the offense committed.” 61 Pa.C.S.A. § 331.19. The reasons given by the Board for denial of parole disclosed that it considered those factors in exercising its discretion. This Court does not find that there has been any abuse of discretion.

Petitioner's final claim is that she was denied access to the state courts. It goes without saying that prisoners have a constitutional right of access to the courts. See Bounds v. Smith, 430 U.S. 817 (1977). However, because no liberty interest is

implicated by a denial of parole, this right of access does not include the right to appeal a parole decision in state courts. See Debrose v. Chesney, 1996 WL 4093, \*4 (E.D. Pa. Jan. 2 1996). Moreover, petitioner has in no way indicated that her access to the state courts was blocked. Although this Court has concluded such action would be futile, petitioner could nonetheless have filed, and can still file, a petition for writ of mandamus in state court. See Lewis v. Casey, 116 S.Ct. 2174, 2180 (1996) (holding that states need only provide ““a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.””). Accordingly, the Court concludes that petitioner’s constitutional right of access to state court has not been infringed.

**Conclusion:** For the foregoing reasons, the Court has denied the applicant’s Petition for Writ of Habeas Corpus.

**BY THE COURT:**

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**JAN E. DUBOIS**